No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

MARTIN ARAIZA-JACOBO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Every federal court of appeals recognizes that the unwarranted submission of a "deliberate ignorance" instruction—one that informs the jury that it may find the defendant had "knowledge" of any fact he deliberately avoided learning—is a trial error. But the circuits are sharply divided over the standard for determining when, if ever, that error independently merits reversal. Five circuits deem the error harmless only upon a showing that there is no reasonable possibility that the instruction influenced the jury's verdict, and these courts have reversed where the record failed to provide the requisite level of confidence in the outcome. In contrast, the seven remaining circuits hold that this instructional error is *per se* harmless so long as the record contains legally sufficient evidence of actual knowledge, and thus, guilt.

The question presented is:

Whether the standard for assessing the harmlessness of an erroneously submitted deliberate-ignorance instruction turns only on the legal sufficiency of the evidence of guilt, as the First, Third, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits hold, or instead requires an inquiry into the instruction's potential effect on the jury's verdict, as the Second, Seventh, Eighth, Ninth, and D.C. Circuits hold.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Martin Araiza-Jacobo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The published opinion of the court of appeals (Pet. App. 1a-13a) is reported at 917 F.3d 360 (5th Cir. 2019).

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2019, and a timely petition for rehearing en banc was denied on May 1, 2019. This petition is filed within 90 days of that date and is therefore timely. *See* Sup. Ct. R. 13.1 & 13.3. The Court has jurisdiction under 28 U.S.C. § 1254(1).

DIRECTLY RELATED PROCEEDINGS

There are no other state or federal proceedings "directly related" to petitioner's case in this Court. *See* Sup. Ct. R. 14.1(b)(iii).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

2. Section 2111 of Title 28, United States Code, provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

3. Federal Rule of Criminal Procedure 52 provides:

> **(a) Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> **(b) Plain error.** A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

INTRODUCTION

Every federal circuit court of appeals recognizes that the unwarranted submission of an instruction defining the element "knowingly" to include "deliberate ignorance" is a trial error. And for good reason: it is universally accepted in American legal jurisprudence that where there is insufficient evidence of deliberate ignorance—i.e., where the evidence suggests the defendant either actually knew an operant fact (and is guilty) or actually did not know that fact (and is innocent)—telling the jury that it may infer guilty "knowledge" if the defendant deliberately avoided learning "what would otherwise have been obvious to him," Pet. App. 17a, inherently risks diluting the government's burden of proof to something akin to recklessness or even negligence. For decades, the precedent of every circuit has thus warned, re-warned, and warned again that these instructions have exceedingly limited applicability and should rarely be given.

But the circuits are split, and intractably so, over the proper standard for finding this pervasive species of trial error harmless. Seven circuits, including the Fifth, deem the error harmless so long as the record contains legally *sufficient* evidence of actual knowledge. In other words, in these circuits, the improper submission of this fraught instruction can only lead to reversal if the government's case as to actual knowledge was so weak that it should have led to a directed verdict of acquittal. The remaining five circuits, in contrast, apply this Court's traditional harmlessness test for trial errors, *see Kotteakos v. United States*, 328 U.S. 750 (1946); *Chapman v. California*, 386 U.S. 18 (1967), focusing on the error's potential effect on the jury, in view of the entire record, and placing the burden on the government to

convincingly demonstrate that the instruction could not reasonably have contributed to the conviction. If the evidence of actual knowledge is sufficient, but not so overwhelming as to remove any reasonable possibility that the instruction influenced the verdict, these circuits will reverse and remand for a new trial in front of a properly instructed jury.

All of the traditional criteria for this Court's review are present here. The question presented is the subject of a deep and acknowledged split in the federal courts of appeals. The source of the division is confusion over the scope and meaning of one of this Court's decisions. The difference is outcome determinative. And every circuit has weighed in. The time is ripe for this Court to resolve the division over this important and recurring issue, and this case is a compelling vehicle for doing so. This Court should grant certiorari.

STATEMENT[1]

A. Factual background

Petitioner Martin Araiza-Jacobo is a 55-year old legal permanent resident alien with no criminal history. After separating from his wife and losing his job, petitioner began working as a "cruzador"—or crosser—at the Gateway International Bridge spanning the border between Matamoros, Mexico, and Brownsville, Texas. That means he made his living crossing groceries and other items over the bridge, on foot, for small cash tips.

[1] The facts summarized in this section are described at length, supported by detailed citation to the record, in petitioner's opening brief in the court of appeals. *See* Brief for Appellant at 3-33, *United States v. Araiza-Jacobo*, 917 F.3d 360 (5th Cir. 2019) (No. 17-40958), 2018 WL 1121802. No part of that description was ever contested by the government, and it is consistent with the court of appeals' recitation of the facts in the opinion below. *See* Pet. App. 2a-7a.

The present case arose from a January 19, 2017, incident at the bridge. That day, petitioner had agreed to cross two sealed 4.4 kilogram bags of "El Piñatero Mega, Piñata Party Candy Mix" for someone he did not know—a not uncommon occurrence in the life of a cruzador. Around noon, he entered the bridge's pedestrian lane and presented the bags (as well as a torta sandwich) to border agents for inspection. By all accounts, he was not acting nervous. The trained agents, focused on the bags, quickly spotted two discrepancies that provoked their suspicion: (1) while most of the candy wrappers matched the candies pictured on the outside of the bags, some did not; and (2) these nonconforming candies felt harder than one would expect. The agents x-rayed and opened one of the bags, and, only after using a knife to cut into one of the nonconforming candies, discovered an odorless, powdery substance later determined to be methamphetamine. After a four-hour interrogation, throughout which he vehemently denied knowing of the bags' hidden contents, petitioner was arrested, indicted, and ultimately tried on four drug-related charges.[2]

B. Proceedings below

At trial, the sole contested issue was petitioner's knowledge of the hidden drugs. The government proceeded on the theory that petitioner knew about the drugs (and the scheme to import and distribute them) all along and had simply lied during his interrogation. But the case was weak. The government's own witnesses corroborated petitioner's core explanation

[2] Counts 2 and 4 charged petitioner with possessing with intent to distribute, and importing, the methamphetamine, 21 U.S.C. §§ 841(a)(1) and 952(a). Counts 1 and 3 charged him with conspiring to do both of these things, *id.* §§ 846 and 963.

of the events leading up to the trip, corroborated his explanation for the amount of money and the other items (the torta) he was carrying, and confirmed that this particular crossing request, including the way it originated, was not suspicious. Moreover, there was the obvious problem that the physical evidence reinforced the plausibility of petitioner's claim that he looked at these bags and perceived nothing fishy. One federal agent agreed on the stand that "when you look at one of the[ ] bags, it just looks like candy." Another testified that, "just by looking," the nonconforming packages "had candy in [them] for all [he] knew.[3]

As a failsafe, the government pressed for an instruction that would give the jury the option to find "knowledge" if it believed that petitioner had deliberately remained ignorant of the hidden drugs. Over objection, the district court granted the request. Appended to the general definition of "knowingly," the instruction provided in full:

> "Knowingly" means that the act was done voluntarily and intentionally, not because of mistake or accident.
>
> You may find that a defendant had knowledge of a fact if you find that the defendant was "deliberately ignorant," meaning that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. Knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, however, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact. 'Deliberate ignorance' does not lessen the government's burden to show, beyond a reasonable doubt, that the knowledge elements of the crimes have been satisfied.

Pet. App. 16a-17a.

[3] The petition appendix includes pictures of the candy bags, and the candies, that the government provided to the jury as trial exhibits. *See* Pet. App. 18a-20a.

The government exploited the "deliberate ignorance" instruction throughout opening and rebuttal closing argument. On the one hand, the prosecutor argued that *all* of the evidence indicated that petitioner actually knew about the drugs. On the other, the prosecutor asserted that "even if" the jury believed petitioner "didn't know what was in [the bags]"—a finding that should have triggered acquittal—this same evidence established his guilt under the deliberate-ignorance instruction. Worse, the prosecutor repeatedly asserted that the fact that petitioner had looked at the sealed bags, seen candy inside, and perceived nothing wrong was of no consequence. Even "look[ing] at the evidence in the light most favorable to [petitioner]," the prosecutor repeatedly told the jury, petitioner *should have known* he needed to inspect the bags at least as thoroughly as the formally trained agents had, and his failure to do so qualified as deliberate ignorance.

This should-have-known theme recurred throughout the opening and rebuttal summations. At various points, the prosecutor emphasized the "common knowledge" that "we tell our kids": "don't take candy from strangers"; suggested that testimony established that "everyone down at the bridge knows you don't go across the bridge and take candy from a stranger in Mexico asking you to bring it into the United States"; asserted that, as a cruzador, petitioner "should have been aware of th[e] risk" that someone would try to get him to smuggle drugs; and criticized petitioner for merely looking at the bags, not "handl[ing]" and "manipulat[ing]" them "like [he] should have." Indeed, the prosecutor ended his rebuttal by urging the jury to convict on the deliberate-ignorance theory alone, stressing: "Anybody looking at these facts knows what's going on here. This is a drug deal. And if [petitioner] didn't know,

it's because he didn't want to know. But you know the truth. And we ask you to find him guilty on all counts."

The jury found petitioner guilty on all four counts. At sentencing, the district court imposed concurrent mandatory-minimum terms of 10 years as to each. But the court did so with extreme reservation, going so far as to "plac[e] on the record" its belief that, "based on the facts of [petitioner's] case," the sentence amounted to "cruel and unusual punishment."[4]

On appeal, petitioner argued that giving the instruction was reversible error, and that he was entitled to a new trial because the government could not prove that the error was harmless. On the harmlessness point, petitioner argued that the evidence that he actually knew was equivocal, and thus not so compelling as to eliminate all reasonable possibility that the erroneous instruction affected the jury's verdict. He pointed out that all of the evidence that might reasonably suggest actual knowledge was circumstantial, and counterbalanced by reasonable, innocent explanations. He further emphasized that his no-knowledge defense was corroborated in multiple ways by multiple witnesses, and that, despite several inconsistencies, his explanation to the interrogators was consistent as to the core facts most probative of his mental state.

As to the error's effect, petitioner highlighted several indicia of probable influence. Pointing to the Fifth Circuit's repeated warnings that the natural effect of a deliberate-ignorance instruction is to tempt the jury to dilute the government's burden of proof to a lesser

[4] The court used this phrase colloquially, making clear that it was not suggesting that the sentence actually violated the Eighth Amendment, as construed by this Court.

"should have known" theory of knowledge, he argued that the prevalent role the instruction played at his trial increased the likelihood that the jury would yield to this inherent temptation. This was particularly so, he stressed, in light of the fact that the prosecutor expressly and repeatedly encouraged the jury to use the instruction to dilute the knowledge element to should have known—i.e., to convict him for innocent conduct.

The court of appeals affirmed petitioner's convictions. Pet. App. 1a-13a. The court agreed that the evidence plainly did not support deliberate ignorance, and that the district court consequently erred in giving the instruction. Pet. App. 7a-10a. The court noted that there was "virtually no evidence" suggesting that petitioner took deliberate action to avoid learning that his conduct might be illegal. Pet. App. 9a. "The evidence point[ed] the other way," the court explained, highlighting "evidence that [petitioner] observed the bags and thought they looked fine, and also that he thought the unnamed man [who asked him to cross the bags] 'looked trustworthy.'" Pet. App. 9a. The court also noted that "[t]he government's argument on appeal demonstrate[d] confusion on this point" by attempting to justify the instruction on the ground that petitioner "*should have noted* the same things" that the agents noticed. Pet. App. 10a (court of appeals' emphasis). This argument, the court emphasized, was simply a call to "water down the *mens rea* requirement of the charged crimes" and was therefore "improper." Pet. App. 10a.

The court nevertheless held that the instructional error was harmless. Pet. App. 11a-13a. The court reiterated that in the Fifth Circuit an erroneous deliberate-ignorance instruction "is harmless where there is substantial evidence of [the defendant's] actual knowledge,"

Pet. App. 11a (quoted source omitted), and explained that "[s]ubstantial evidence means relevant evidence acceptable to a reasonable mind as adequate to support a conclusion." *Id.* (quoting *Simmons v. United States*, 406 F.2d 456, 464 (5th Cir. 1969)). The court found this standard satisfied based on verdict-favorable inferences that the jury *could* have made about (1) petitioner's credibility, (2) the quantity of methamphetamine, and (3) some of petitioner's actions during the bridge inspection. Pet. App. 11a-12a. The court did not discuss the strength of this evidence in relation to the counterevidence it had highlighted earlier in the opinion (e.g., that petitioner "observed the bags and thought they looked fine," and trusted the man who gave them to him). Nor did the court consider what effect the instruction's use and significance at trial may have had on the defense or the jury. Indeed, despite having called out the impropriety of the government's resort to the diluted should-have-known standard on appeal, the court's harm analysis made no mention of the fact that the trial prosecutor invited the jury to embrace the same standard in opening and rebuttal summation.

Petitioner timely sought en banc rehearing. He urged the court of appeals to reconsider its practice of disposing of this particular instructional error as harmless based solely on sufficiency grounds, emphasizing that doing so was in direct conflict with this Court's harmless-error precedents. The court denied rehearing. Pet. App. 14a-15a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve the acknowledged and entrenched circuit split that has developed over the standard for determining whether the unwarranted submission of a deliberate-ignorance instruction amounts to harmless trial error.

A. The circuits are split over the standard for assessing harmlessness when a jury is erroneously instructed that it may substitute deliberate ignorance for knowledge.

The courts of appeals are split seven-to-five over the proper harmlessness standard to be employed in the context of the erroneous submission of a deliberate-ignorance instruction.

The federal harmless-error statute, 28 U.S.C. § 2111, and Federal Rule of Criminal Procedure 52(a) each direct federal courts of appeals to correct only those errors that "affect substantial rights." This Court long ago established the standard for determining whether a trial error had the requisite effect under these provisions. The standard is met if the error "had substantial and injurious effect or influence in determining the jury's verdict," *Kotteakos v. United States*, 328 U.S. 750, 776 (1946), and requires the appellate court to ask "'whether there is a reasonable possibility that the [error] complained of might have contributed to the conviction.'" *Chapman v. California*, 386 U.S. 18, 23 (1967) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963)). When the error is constitutional in nature, the appellate court "must be able to declare a belief that [the error] was harmless beyond a reasonable doubt." *Id.* at 24. Non-constitutional errors require a "fair assurance" of the absence of any possible effect. *Kotteakos*, 328 U.S. at 765. In other words, if the reviewing court is left in "grave doubt"—meaning that the court is in "equipoise" as to whether the error influenced the verdict—then

it must find that the error was not harmless. *O'Neal v. McAninch*, 513 U.S. 432, 435, 437-38 (1995). In both instances, the Court has insisted that the burden of persuasion must lie with the government. *See Kotteakos*, 328 U.S. at 765; *Chapman*, 386 U.S. at 24.

Over the years, the Court has phrased the *Kotteakos* and *Chapman* formulations in various ways. But the consistent and indispensable feature of the traditional harmless-error analysis is its focus on the error's potential *effect* on the jury's verdict, in view of the *entire* record. And that inquiry "is entirely distinct from a sufficiency-of-the-evidence inquiry." *United States v. Lane*, 474 U.S. 438, 450 n.13 (1986). Nevertheless, there is deep disagreement among the courts of appeals over whether, and to what extent, this standard should be modified in the context of the submission of an unsupported deliberate-ignorance instruction.

Seven circuits (the First, Third, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits) hold that when a jury charge erroneously defines "knowledge" to include deliberate ignorance—because insufficient (or no) evidence at trial supported that theory—the error is necessarily harmless if the record contains legally sufficient evidence of "actual knowledge." The first court to adopt this sufficiency approach was the Eleventh Circuit, in *United States v. Stone*, 9 F.3d 934 (11th Cir. 1993). Notably, before *Stone*, that court had applied the traditional test, deeming the erroneous submission of an unwarranted deliberate-ignorance instruction "harmless beyond a reasonable doubt" based on its conclusion that the error "did not affect the jury's verdict because the evidence against the defendants was 'so overwhelming as to compel a guilty verdict.'" *United States v. Rivera*, 944 F.2d 1563, 1572-73 (11th Cir. 1991) (quoted source omitted).

In *Stone*, however, although purporting to apply the "harmless beyond a reasonable doubt" standard, 9 F.3d at 937, the court eschewed any inquiry into the instruction's potential effect on the jury. The court expressly acknowledged that the "evidence of actual knowledge in th[e] case was sufficient to support a guilty verdict but was not overwhelming," *id.* at 937, but nevertheless held that sufficiency was all that was necessary to render the error harmless. *See id.* at 938-42. Invoking the "almost invariable" presumption that juries obey a trial court's instructions, *id.* at 938 (quoting *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)), the court reasoned that,

> If . . . there was insufficient evidence of deliberate ignorance to prove that theory beyond a reasonable doubt, then the jury, following the instruction, as we must assume it did, did not convict on deliberate ignorance grounds. The only way we can conclude that the deliberate ignorance instruction was harmful is if we assume that the jury applied the instruction contrary to its express terms. That is an assumption which we cannot and will not make.

Id.

The court explained that, in its view, this reasoning followed directly from this Court's decision in *Griffin v. United States*, 502 U.S. 46 (1991), *see Stone*, 9 F.3d at 938-39, which reaffirmed the rule that "when a jury returns a verdict on an indictment charging several acts in the conjunctive," that "verdict stands if the evidence is sufficient with respect to any of the acts charged." *Griffin*, 502 U.S. at 56-57 (quoting *Turner v. United States*, 396 U.S. 398, 420 (1970)). Though *Griffin* had not dealt with harmless error (and indeed found no error at all), the *Stone* court found the issue addressed in that case "closely analogous" to the instructional error before it. The court thus held that proffering an unwarranted deliberate-ignorance

instruction "is harmless *per se*" because, in any case where the evidence of actual knowledge is legally sufficient, "there is no reason to believe that the jury convicted [the defendant] on a deliberate ignorance theory." *Stone*, 9 F.3d at 939, 941-42.

In the wake of *Stone*, the remaining six circuits likewise adopted sufficiency-of-the-evidence as the harmlessness standard for this particular instructional error. *See United States v. Fermin*, 771 F.3d 71, 79 (1st Cir. 2014); *United States v. Leahy*, 445 F.3d 634, 654 n.15 (3d Cir. 2006); *United States v. Lighty*, 616 F.3d 321, 378-80 (4th Cir. 2010); Pet. App. 11a (citing, *e.g.*, *United States v. Oti*, 872 F.3d 678, 698 (5th Cir. 2017)); *United States v. Mari*, 47 F.3d 782, 785-87 (6th Cir. 1995); *United States v. Ayon Corrales*, 608 F.3d 654, 658 (10th Cir. 2010). The Eleventh Circuit's decision even provoked two circuits that had previously applied the traditional effect-based standard, the Fourth, *see United States v. Whittington*, 26 F.3d 456, 464 (4th Cir. 1994), and the Tenth, *see United States v. de Francisco-Lopez*, 939 F.2d 1405, 1412-13 (10th Cir. 1991); *United States v. Hilliard*, 31 F.3d 1509, 1516-17 (10th Cir. 1994), to switch to mere sufficiency. *See United States v. Hanzlicek*, 187 F.3d 1228, 1236 (10th Cir. 1999); *United States v. Ebert*, 178 F.3d 1287 (Table), 1999 WL 261590, at *28-*31 (4th Cir. 1999).

In direct contrast, five circuits (the Second, Seventh, Eighth, Ninth, and D.C. Circuits) treat these instructional errors like all other trial errors, focusing the harmlessness inquiry on the probability that the erroneous instruction influenced the jury's consideration of the evidence and therefore contributed to the verdict. *See United States v. Quinones*, 635 F.3d 590, 595-96 (2d Cir. 2011); *United States v. Macias*, 786 F.3d 1060, 1061-64 (7th Cir. 2015);

United States v. Covington, 133 F.3d 639, 644-45 (8th Cir. 1998); *United States v. Mapelli*, 971 F.2d 284, 286-87 (9th Cir. 1992); *United States v. Alston-Graves*, 435 F.3d 331, 229-30 (D.C. Cir. 2006).

These courts often loosely reference their inquiry as a search for "overwhelming evidence" of actual knowledge. But there is no doubt that these courts are applying the traditional harm analysis established in *Kotteakos* and *Chapman*. *See, e.g.*, *United States v. Ciesiolka*, 614 F.3d 347, 355 (7th Cir. 2010) (noting that the "relevant question must be: 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error[,]'" and concluding that "[g]iven the significance of the error in introducing a jury instruction that relieved the government of its burden of proof, in addition to the exculpatory evidence just noted, we cannot answer this question in the affirmative." (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)); *United States v. Barnhart*, 979 F.2d 647, 653 (8th Cir. 1992) (finding error was not harmless because (1) it was plausible that the jury could have interpreted the evidence in a way that "impermissibly diminish[ed] the knowledge requirement," and (2) the "evidence against Barnhart [wa]s not especially strong" in that the evidence of actual knowledge "came down to a credibility determination").

The results reached by the courts applying this traditional standard demonstrate that the difference between the two standards is outcome determinative. Courts employing the effect-based inquiry have reversed based on the unwarranted submission of a deliberate-ignorance instruction, despite the presence of legally sufficient evidence of actual knowledge, on numerous occasions.

The Seventh Circuit has done so in at least four cases. *See Macias*, 786 F.3d at 1063 (reversing where the "evidence against Macias was sufficient but not overwhelming," and, "[g]iven the ostrich instruction, the jury conceivably could have convicted Macias because he wasn't curious enough to discover the source of the illegal funds"); *see also Ciesiolka*, 614 F.3d at 353-55; *United States v. L.E. Myers Co.*, 562 F.3d 845, 854-55 (7th Cir. 2009); *United States v. Giovannetti*, 919 F.2d 1223, 1227-29 (7th Cir. 1990), *as amended by United States v. Giovannetti*, 928 F.2d 225, 226 (7th Cir. 1991) (per curiam). The Second Circuit has reversed twice, once on plain error. *See United States v. Kaiser*, 609 F.3d 556, 566-67 (2d Cir. 2010) (on plain error); *United States v. Sicignano*, 78 F.3d 69, 72-73 (2d Cir. 1996). The Ninth Circuit has deemed reversal appropriate on six occasions. *See United States v. Aguilar*, 80 F.3d 329, 330-34 (9th Cir. 1996) (en banc); *United States v. Baron*, 94 F.3d 1312, 1317-19 (9th Cir. 1996); *Mapelli*, 971 F.2d at 287; *United States v. Sanchez-Robles*, 927 F.2d 1070, 1075-76 (9th Cir. 1991); *United States v. Pac. Hide & Fur Depot, Inc.*, 768 F.2d 1096, 1098-99 (9th Cir. 1985) (Kennedy, J.); *United States v. Beckett*, 724 F.2d 855, 856 (9th Cir. 1984).[5] The Eighth Circuit has reversed only once. *See Barnhart*, 979 F.2d at 650, 652-53, 653 n.1. And before changing sides, the Tenth Circuit encountered three cases meriting reversal. *See Hilliard*, 31 F.3d at 1516-17; *United States v. Galindo-Torres*, 953 F.2d 1392 (Table), 1992 WL 14921, at *3 (10th Cir. 1992); *de Francisco-Lopez*, 939 F.2d at 1408-09, 1413.

[5] *Sanchez-Robles*, *Pacific Hide*, and *Baron* were either disapproved of or overruled on other grounds by *United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007) (en banc).

All told, at least 16 federal convictions have been reversed based on the recognition that, even though the evidence was sufficient enough to avoid acquittal, it was nevertheless reasonably possible that the jury's exposure to the unwarranted instruction contributed to the verdict. Each of these convictions would have been affirmed under the sufficiency standard employed by the majority of circuits.

The stakes are much higher than the chance—monumental in its own right—to get a new trial in front of a properly instructed jury. Taking the option of deliberate ignorance off the table can drastically change the equation on remand, even resulting in outright dismissal.

For instance, after the Seventh Circuit's reversal in *Ciesiolka*, the government ultimately filed an new information, based on the same conduct, charging Ciesiolka with the less serious offense of transferring obscenity, in violation of 18 U.S.C. § 1470. *See* Information, *United States v. Ciesiolka*, 12-cr-156 (N.D. Ind. Nov. 7, 2012) (docket entry 1). Pursuant to a plea agreement, Ciesiolka pleaded guilty to the less serious offense, and the government moved to dismiss the original enticement charges.[6] This represented a significant change in outcome, given that the obscenity charge carried a maximum prison term of 10 years, whereas the dismissed enticement charge carried a mandatory minimum term of 10 years and a maximum of life. *Cf.* 18 U.S.C. § 2422(b). Though other considerations undoubtedly played on the plea-bargaining process, there is every reason to believe that the Seventh Circuit's reversal, and the consequent removal of the option to reinforce a weak case as to

[6] *See* Plea Agreement 3-5, *United States v. Ciesiolka*, 12-cr-156 (N.D. Ind. Nov. 7, 2012) (docket entry 2); *see also* Order for Dismissal, *United States v. Ciesiolka*, 06-cr-163 (N.D. Ind. Nov. 11 2013) (docket entry 162) (granting motion to dismiss enticement charges).

actual knowledge with a deliberate-ignorance instruction, influenced the decision to offer the reduced charge.

The starkest illustrations of divergent treatment are cases that have been dismissed on remand. That is what happened in *L.E. Meyers Co.* After the Seventh Circuit's reversal, the government moved to dismiss the charges with prejudice, and the district court granted the motion, ordering the $500,000 criminal fine assessed against the company returned in the process. *See* Order of Dismissal, *United States v. The L.E. Myers Company*, No. 02-cr-1205 (N.D. Ill. Aug. 5, 2009).

These results make sense. In most cases, a prosecutor's honest but mistaken belief that a deliberate-ignorance instruction is appropriate signals that the strength of her case as to actual knowledge is relatively weak—the very predicate for the instruction is the presence of evidence suggesting that the defendant purposefully *did not* know. Shorn of the mistaken impression that the evidence supported guilt on this theory, the prosecutor *should* consider dismissing, or offering reduced charges, if the case for actual knowledge truly is equivocal. This sensible reassessment can *never* happen in the courts that end the harmlessness inquiry at sufficiency. In short, the difference matters, and it matters a great deal.

This circuit conflict is ripe for this Court's review. In addition to being outcome determinative, the conflict has been noted by the courts of appeals, *see Mari*, 47 F.3d at 787; *Stone*, 9 F.3d at 930-40, flagged by commentators, *see* Justin C. From, *Avoiding Not-so-Harmless Errors: The Appropriate Standards for Appellate Review of Willful-Blindness Jury Instructions*, 97 Iowa L. Rev. 275, 291-95 (Nov. 2011), and acknowledged by the Solicitor

General. *See* United States' BIO at 12-13, 15-19, *Okechuku v. United States*, 138 S. Ct. 1990 (2018) (No. 17-1130), 2018 WL 1621255 (*Okechuku* BIO).

Nor is there any reasonable basis to believe that the issue requires additional percolation. Every circuit has staked out its position. And those conflicting positions are firmly entrenched. As noted above, the Fourth, Tenth, and Eleventh Circuits each initially deemed traditional harmless-error analysis appropriate, but have already switched to the opposite side of the split. These courts are highly unlikely to reverse course again. Indeed, the Tenth Circuit has expressly doubled down on its newfound commitment to sufficiency. *See Ayon Corrales*, 608 F.3d at 658 (stating that "*Griffin* and *Hanzlicek* control the result here," and finding any error harmless because there was sufficient evidence of actual knowledge). Moreover, several courts have declined specific requests to reconsider their stance on the issue. *See United States v. Geisen*, 612 F.3d 471, 486-87, 487 n.3 (6th Cir. 2010) (rejecting contention "that *Mari* misapplied *Griffin*" and reaffirming that "*Mari* remains controlling law in this circuit"); Pet. App. 14a-15a (denying rehearing petition premised on this very issue).

Only this Court can resolve the dispute, and its intervention is overdue.

B. The question presented is important, and this case is an ideal vehicle for resolving it.

Resolving the conflict over the potency of harmlessness review in the context of this recurring jury-charge error is important. Moreover, petitioner's case is not beset by the vehicle issues present in other cases where this Court has denied review.

The question presented implicates the cross-section of two vitally important areas of criminal law: harmless error, and the potential dilution of the government's burden of proof as to criminal *mens rea*. Harmless-error review is "an integral component of our criminal justice system." *Sullivan v. Louisiana*, 508 U.S. 275, 284 (1993) (Rehnquist, C.J., concurring), and is "one of the most significant tasks of an appellate court, as well as one of the most complex." R. Traynor, THE RIDDLE OF HARMLESS ERROR 80 (1970). That is reflected in the frequency with which this Court has granted review to resolve disparities in the application of this consequential task.

The particular disuniformity at issue here implicates serious concerns that appellate courts are routinely failing to remedy dilutions of the mental state required to make one's conduct criminal. For decades, courts and commentators have acknowledged that instructing a jury that it can infer knowledge from deliberate ignorance inherently risks opening the door to conviction based on innocent conduct. *See, e.g.*, *Alston-Graves*, 435 F.3d at 340-41 (D.C. Cir.) (noting that "[o]ne problem with the various formulations of this instruction is that the jury might convict a defendant for acting recklessly . . . or even for acting negligently," and collecting numerous cases and academic sources). The danger is that the unsupported instruction might confuse and mislead jurors who reasonably doubt the defendant actually knew to nevertheless convict if they also believe that he should have known. Former Justice Kennedy was attune to, and deeply concerned about, this problem, noting that "[s]uch convictions are wholly inconsistent with the statutory requirement of scienter." *United States v. Murrieta-Bejarano*, 552 F.2d 1323, 1325-26 (9th Cir. 1977) (Kennedy, J., concurring in part

and dissenting in part); *see also United States v. Jewell*, 532 F.2d 697, 706-07 (9th Cir. 1976) (en banc) (Kennedy, J., dissenting); *Pacific Hide & Fur Depot, Inc.*, 768 F.2d at 1098 (Kennedy, J.).[7]

In other words, it is well accepted in case law and scholarship that the trial error at issue here is highly likely to influence the jury's deliberations in a way that "eviscerates the law's requirement that the defendant acted 'knowingly,'" Pet. App. 8a, "thereby relieving the government of its constitutional obligation to prove the defendant's knowledge beyond a reasonable doubt," *Barnhart*, 979 F.2d at 652. The universal recognition of the danger inherent in this particular instruction only elevates the need for clarity vis-à-vis the standard for determining when, if ever, that likely influence merits reversal.

This case is an excellent vehicle for providing that clarity. The instruction's propriety was litigated at every stage in the proceeding, and the panel unequivocally and unanimously found that it was submitted in error. There is no disputing the central role the instruction played at trial—a good deal of evidence implied that petitioner was derelict for failing inspect the bags as thoroughly as the agents had, and the deliberate-ignorance theory featured prominently in the prosecution's closing remarks to the jury. And the court of appeals' focus on the bare sufficiency of the evidence of actual knowledge was dispositive of the harmless-error question.

[7] *Murrieta-Bejarano* was overruled on other grounds by *United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007) (en banc).

The government will no doubt argue that the fact that the Court has previously denied petitions raising this issue counsels in favor of denial. For example, the Court has recently denied petition in 2011, *see Geisen v. United States*, 563 U.S. 917, 2016, *see Lopez v. United States*, 136 S. Ct. 1376, and 2018, *see Okechuku v. United States*, 138 S. Ct. 1990. But petitioner's case suffers from none of the vehicle problems the government highlighted in those cases.

In *Geisen*, because the court of appeals found no error in the factual predicate for the deliberate-ignorance instruction below, this Court's ability to address the split on harmlessness depended on a threshold issue that the government criticized, correctly, as factbound and splitless. *See* United States' BIO at 15-20, *Geisen v. United States*, 563 U.S. 917 (2011) (No. 10-720), 2011 WL 792956. In *Lopez*, the court of appeals merely assumed error in giving the instruction, leaving that threshold issue open to dispute. Moreover, the government rightly emphasized that, given the complex nature of the facts underlying the charged multi-defendant fraud offense, the likelihood that any error would be harmless even under the effect-based analysis was particularly weak. *See* United States' BIO at 22-25, *Lopez v. United States*, 136 S. Ct. 1376 (2016) (No. 15-517), 2016 WL 369498. *Okechuku*, like *Geisen* and *Lopez*, also involved a complex fact scenario that blurred the likelihood of relief even under the traditional harmlessness test. Plus, the government had not even mentioned the instruction at trial, so the proposition that the error may have influenced the jury depended heavily on the petitioner's criticisms of the wording of the instruction. Finally, the fact that the case was on plain-error review erected additional barriers to the Court reaching the harmlessness

issue in the first place. *See Okechuku* BIO at 19-23.

These obstacles are not present here. Moreover, unlike those cases, petitioner's case is a particularly attractive factual vehicle. The case does not involve a deep and complicated set of facts arising out of a complex regulatory offense (*Geisen*), fraud (*Lopez*), or multi-defendant conspiracy (*Okechuku*). Rather, the circumstances surrounding the alleged offense are straightforward, and the facts supporting the instruction's potential influence on the jury (touched on above at Pet. 8-9) are readily apparent.

C. The Fifth Circuit's decision is incorrect.

This Court's review is also warranted because the harmless-error standard employed by the Fifth Circuit below is clearly wrong. Erroneous submission of a deliberate ignorance instruction is a trial error. Like any other trial error, it is subject to Rule 52(a). And this Court has interpreted Rule 52(a) to require federal courts to judge harmlessness based on an error's potential effect on the jury's verdict, not the sufficiency of the untainted evidence of guilt. The approach of the Fifth Circuit, and the other "sufficiency" circuits, directly contravenes this principle, and it derives from a misinterpretation of this Court's decision in *Griffin*.

The specifics of harmlessness review may vary depending on the nature of the particular error at issue, but this Court has always insisted on the same basic mode of analysis. First, the appellate court must search the entire record for objective indications that the error did (or did not) influence the verdict. Second, the government bears the burden of demonstrating the absence of any reasonable possibility that the error contributed to the conviction.

Time and again, the Court has made clear that this inquiry "is entirely distinct from a sufficiency-of-the-evidence inquiry." *Lane*, 474 U.S. at 450 n.13; *see also Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988) ("The question is not . . . whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (quoting *Chapman*, 386 U.S. at 24)); *Fahy*, 375 U.S. at 86-87 ("We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of."); *Kotteakos*, 328 U.S. at 765 ("The inquiry cannot be merely whether there was enough [evidence] to support the result, apart from the phase affected by the error."). The lower courts' practice of dismissing the erroneous submission of a deliberate-ignorance instruction as harmless based on the mere *sufficiency* of the evidence of guilt cannot be squared with these unequivocal admonitions.

That practice is derived from a misinterpretation and misapplication of this Court's decision in *Griffin v. United States*, 502 U.S. 46 (1991). *Griffin* had nothing to do with harmless error—in fact, the Court found no error at all. Rather, this Court simply applied the well-established rule that when a jury returns a general verdict on an indictment charging two alternative means of satisfying a single properly defined element, the fact that the evidence at trial was sufficient as to only one alternative does not work a due-process violation. *See id.* at 56-57 (citing *Turner*, 396 U.S. at 420). From the Court's conclusion that no error occurred at all, it follows, per force, that the Court had no occasion to apply harmless-error

principles. By reading *Griffin* as involving an instructional error deemed categorically harmless, the sufficiency circuits have misinterpreted the Court's otherwise unobjectionable holding.

Nor is there any basis to transplant that holding to the context of assessing the harmlessness of the instructional *error* at issue here. For one, deliberate ignorance is not an alternative to actual knowledge; it is a means of inferring actual knowledge. *See United States v. Ramsey*, 785 F.2d 184, 189 (7th Cir. 1986) (Easterbrook, J.) ("An ostrich instruction informs the jury that actual knowledge and deliberate avoidance of knowledge are the same thing."); *Jewell*, 532 F.2d at 700-01 & nn. 4-9 (citing numerous scholarly authorities explaining this). Indeed, as is typical, the deliberate-ignorance instruction submitted in petitioner's case appeared within the general definition of "knowingly." *See* Pet. App. 17a. The jury was not told that deliberate ignorance was an alternative to "actual" knowledge (a term not mentioned, much less defined). Rather, the jury was told that deliberate ignorance *is* knowledge.

Moreover, the assumption that in every conceivable case jurors will disregard that instruction when unsupported is incorrect. The sufficiency circuits hinge their reasoning on the premise that if the trial evidence is insufficient as to deliberate ignorance, but sufficient as to actual knowledge, the erroneous instruction could never influence the jury. If there is little-to-no evidence of conscious avoidance, these circuits reason, the jury will ignore the language respecting deliberate ignorance and instead focus exclusively on actual knowledge. *See Mari*, 47 F.3d at 785-86; *Stone*, 9 F.3d at 938-40.

This overlooks that the instruction's natural tendency is to encourage jurors to conflate evidence of innocence—that the defendant did not know but should have—with evidence of guilt. *See Mapelli*, 971 F.2d at 287 (finding that "the effect of the instruction, if it had an effect, could only have been to enable the jury to convict if they thought [the defendant] was ignorant of the [fraud] but careless in not finding out."). In a case where the evidence does not reasonably support deliberate ignorance of the critical disputed fact (say, drugs disguised as candy wrappers sealed inside candy bags), evidence that the defendant truly failed to realize that fact, even if it "would have been obvious" to others, Pet. App. 17a, is evidence of innocence. Especially in close cases, the effect of the instruction is thus to transform a legitimate basis for acquittal into an extra base for conviction. Or, as one court put it, the defendant is "placed in the position of essentially having to rebut a presumption that he should have known an operant fact." *de Francisco-Lopez*, 939 F.2d at 1412.

Finally, aside from the instruction's inherent potential to mislead, the assumption that a jury will always disregard it wholly fails to account for cases, like petitioner's, where either through its evidentiary presentation or explicitly in closing argument, the government encourages the jury to embrace the diluted "should have known" standard. It cannot be that urging the jury to apply an instruction in a way that "eviscerates the law's requirement that the defendant acted 'knowingly,'" Pet. App. 8a, is categorically irrelevant to the question whether the instruction's erroneous submission affected substantial rights.

But that is precisely the result of the sufficiency approach employed by the court of appeals below. That approach is incorrect. There is no legitimate basis to discard this Court's

traditional formulation of the federal harmless-error rules in favor of an assumption that jurors will ignore an unwarranted deliberate-ignorance instruction *in every case*. This Court should grant review on this important issue, and it should reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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